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# THE SCOPE OF CRIMINAL RESTITUTION: AWARDING UNLIQUIDATED DAMAGES IN SENTENCING HEARINGS

BRADFORD C. MANK\*

## I. INTRODUCTION

During the past several years a variety of victim groups have forced the criminal justice system to pay more attention to the restitution needs of victims.<sup>1</sup> Criminal courts, however, are still limited in the types of restitution they may award. Typically, sentencing judges can award restitution for the whole range of liquidated damages including the value of stolen or destroyed property, medical expenses, and lost past wages.<sup>2</sup> In most jurisdictions, however, criminal courts cannot award restitution for unliquidated damages involving compensation for pain and suffering, or for lost future earning capacity.<sup>3</sup> Crime victims must initiate a civil suit at their own expense to obtain a civil judgment for unliquidated damages, and then must attempt on their own to force a criminal, who may be violent, to pay these civil damages.

Our present system for awarding unliquidated damages to crime victims does not work well. Unliquidated damage issues primarily affect victims of personal violence. Considerable evidence exists indicating that victims face some obstacles in winning a civil suit, but even greater ones in collecting civil awards for unliquidated damages.<sup>4</sup> Victims would be better off if these issues were handled by criminal courts. Criminal restitution frees crime victims from the responsibilities of bringing a civil action, but most importantly criminal courts can use probation officers and the threat of revocation to induce probationers and parolees to pay their restitution orders.

There are two possible solutions. First, civil collection methods could be improved to help crime victims. Second, the scope of criminal restitution could be expanded to encompass the full range of damage issues, which is already the practice in many European criminal courts.<sup>5</sup> This paper will focus on the second approach, but will discuss the first one.

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1. See Gittler, *Expanding the Role of the Victim in a Criminal Action: Overview of Issues and Problems*, 11 PEPPERDINE L. REV. 117, 118-24 (1984); Goldstein, *Defining the Role of the Victim in Criminal Restitution*, 52 MISS. L.J. 515, 516-20 (1982).

2. See Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of Criminal Courts*, 30 U.C.L.A. L. REV. 52, 87-89 (1982).

3. *Id.*

4. See notes 32-60 *infra* and accompanying text.

5. See Goldstein, *supra* note 1, at 546-47.

Most jurisdictions forbid sentencing judges from ordering restitution for unliquidated damages, but four states clearly permit such awards.<sup>6</sup> There are two major objections against allowing criminal courts to order restitution for unliquidated damages. First, civil courts are better suited in several respects than a judge in a summary sentencing proceeding to resolve complex damage issues involving a speculative element.<sup>7</sup> Second, if judges took enough time to settle such questions then the summary sentencing hearing would be transformed into a lengthy mini-trial.<sup>8</sup> These two arguments apply in some cases, but not in all. The strongest counter argument is the example of the criminal courts in several states which have made such awards without undue difficulty. Some unliquidated damage issues may be too complex to adjudicate in a sentencing hearing, but others are not.

Even if criminal courts could in some cases determine the extent of unliquidated damages, it may not be cost effective. While courts and legislatures are concerned with meeting the restitution needs of victims, there is also an interest in limiting the burdens placed on the criminal justice system.<sup>9</sup> Two factors suggest that criminal courts should award unliquidated damages at least in some cases. First, while one must balance the costs and benefits of awarding certain kinds of damages in criminal courts, there should be a presumption in favor of having sentencing judges order restitution unless there are compelling reasons why a criminal court should not. In the case of liquidated damages many jurisdictions have a statutory presumption in favor of awarding restitution.<sup>10</sup> On average, unliquidated damages are more complex than liquidated damages so the presumptions may be somewhat different when these two different types of damages are involved. If a criminal court, however, can calculate an award for unliquidated damages in a reasonable amount of time then the presumption should be to settle the issue at sentencing rather than compel a victim to bring a civil suit. Second, civil courts are not meeting the needs of many victims of violent crime. Civil courts may be an acceptable alternative to the criminal process in serving the restitution interests of victims of white collar crime, but, even at best, civil courts are ill-suited for the demanding task of actually collecting damages from violent criminals.<sup>11</sup>

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6. For the majority position see, e.g., *State v. Stalheim*, 275 Or. 683, 552 P.2d 829 (1976); *State v. Jarvis*, 146 Vt. 636, 509 A.2d 1005 (1986); for the minority position see notes 20-23 *infra*.

7. This argument is made in the majority cases in *supra* note 6.

8. *Id.*

9. See Harland, *supra* note 2.

10. See notes 140-43 *infra* and accompanying text.

11. See Goldstein, *supra* note 1, at 532-35 (arguing that civil suits can handle many restitution issues involving white-collar crime). The difficulties victims face in collecting restitution from violent criminals are discussed in notes 32-60 *infra*.

Some of the practical problems associated with calculating unliquidated damages can be reduced by adopting a guidelines approach. English courts have experimented successfully with guidelines for determining injury pain and suffering.<sup>12</sup> A guidelines approach, however, would only work with some, but not all kinds of unliquidated damages. The emotional pain and suffering implicated in a rape is too complex to reduce to a formula.<sup>13</sup> Likewise, damages for lost future earnings involve too many individual variations to allow the substitution of a guideline calculation based on average cases. Some varieties of unliquidated damages must be left to civil courts, but in many cases guidelines can permit sentencing judges to resolve damage issues in an expeditious manner.

While guidelines may be able in a number of instances to overcome the practical difficulties involved in assessing unliquidated damages, there are still constitutional questions about how far criminal courts can expand into realms traditionally handled by civil courts. The Seventh Amendment may mandate that certain types of damages be resolved by a civil jury. The Seventh Amendment requires that a civil jury determine common law Actions that existed in 1791 when the Bill of Rights was enacted, but does not apply to equitable remedies. It is uncertain whether unliquidated damages for victim restitution are an equitable or legal remedy. The historical record is far from clear on these points. Further, only minimal due process protections are required at sentencing hearings. Unliquidated damage issues are so complex that it is possible they must be decided in a civil hearing. A civil hearing allows full discovery, elaborate pleadings, and a jury determination based on community sentiment about the value of intangible or speculative damages.

The criminal system is probably unwilling to bear all the costs necessary to guarantee every victim full compensation. But criminal and civil courts can work together, and perform a better job in helping victims to win restitution for unliquidated damages at a reasonable cost.

## II. THE CURRENT SYSTEM

In most jurisdictions criminal courts cannot award damages for pain and suffering, or for lost future earning capacity, but a few states allow such awards. There is a tension between guaranteeing full victim restitution, and reducing the burden on sentencing judges in calculating damage awards. Many courts and legislatures have sought to justify the current limitations on what types of damages may be awarded by criminal courts by claiming that civil courts are even better suited to resolving questions involving unliquidated damages. Other courts, however, have pointed out that, whatever theoretical advantages there may be in hand-

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12. See notes 121-32 *infra* and accompanying text.

13. See generally Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

ing damage questions in civil courts, criminal courts must take steps to insure victims actually receive restitution.

There are two major lines of argument against allowing sentencing judges to award restitution for unliquidated damages. First, some courts and legislatures have rejected permitting such restitution orders because it is too complicated to calculate unliquidated damages in a summary sentencing hearing. Congress debated whether to include unliquidated damages in The Victim and Witness Protection Act of 1982 (VWPA).<sup>14</sup> Unliquidated damages were excluded because of their complexity.<sup>15</sup> "The section requires that restitution be 'as fair as possible to the victim without unduly complicating or prolonging the sentencing process.' The Committee added this provision to prevent sentencing hearings from becoming prolonged and complicated trials on the question of damages owed the victim."<sup>16</sup>

A number of state courts have made a distinction between liquidated and unliquidated damages in terms of their respective complexity.<sup>17</sup> Liquidated damages are relatively easy to measure because they are measured by the present cost of tangible goods and services such as hospital bills, property value, and lost employment income. While unliquidated damages involve predictions about what a person would have made in the future but for an injury, or intuitive speculations about intangible pain and suffering. Thus, courts have allowed sentencing judges to order restitution for liquidated damages since they are "easily ascertainable," but have barred restitution orders for unliquidated damages.<sup>18</sup>

A second reason given by courts for excluding unliquidated damages from the criminal process is that civil courts are better suited to deciding damages involving a speculative, or an intangible element. The Vermont Supreme Court recently argued in *State v. Jarvis*,

It would be inappropriate to allow the trial judge in sentencing proceedings to calculate the amount that should be awarded for uncertain, unliquidated losses and for pain and suffering. The evaluation of such losses is best left to the civil trial judge and

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14. Pub. L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C. §§ 3579-3580) (1982). The restitution provisions of the VWPA are contained in § 5 of the Act, 96 Stat. at 1253-55. Congress considered but rejected including unliquidated damages in the Act. See Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505, 509 n.16 (1984). See 128 CONG. REC. H8207 (daily ed. Sept. 30, 1982) (statement of Rep. McCollum) ("This legislation does not intend that restitution become a substitute for civil damages.").

15. *Id.*

16. S. REP. NO. 532, 97th Cong. 2d Sess. 1, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2515, 2537 (hereinafter SENATE REPORT).

17. See, e.g., *State v. Fleming*, 125 N.H. 238, 243, 480 A.2d 107, 111 (1984) and cases cited *supra* note 7.

18. *Id.*

to the collective wisdom of civil juries. In the civil context, the judge and jury will receive the benefit of pleadings which frame the issues, and testimony from witnesses to develop the relevant evidence.<sup>19</sup>

The liberal discovery allowed in civil courts is an additional feature that favors deciding unliquidated damages in the civil arena.

A few states permit criminal courts to order restitution for pain and suffering, or for lost future earnings. Courts awarding restitution for unliquidated damages have been less impressed with arguments about the supposed complexity associated with calculating unliquidated damages, and more concerned about insuring full victim compensation. Courts holding the minority position have raised the point that civil courts are not always able to enforce their awards. The states of Arizona, Louisiana, Nebraska, and Washington clearly allow criminal courts to award unliquidated damages for pain and suffering.<sup>20</sup> The Louisiana courts have upheld an award for lost future earnings.<sup>21</sup> Lower courts in Pennsylvania and New York have sanctioned restitution for pain and suffering.<sup>22</sup> The State of California allows criminal courts to impose a "restitution fine" based on the extent of pain and suffering, but this fine is paid into a statewide fund for the reimbursement of all victims rather than to the specific victim.<sup>23</sup>

Some courts have justified awards of unliquidated damages on the grounds that they are necessary both to fully compensate the victim, and to promote the offender's rehabilitation. Under this theory, an offender's rehabilitation cannot be complete unless he fully compensates the victim. The Pennsylvania appellate court upheld an award for emotional pain and suffering in *Commonwealth v. Balisteri*,

As the various tort cases demonstrate a person may suffer more than just a physical injury to his or her body. The purpose of restitution is rehabilitation of the offender by impressing upon him or her the loss he or she has caused and that it is his or her responsibility to repair that loss as far as it is possible to

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19. 509 A.2d at 1007.

20. *Matter of Maricopa County Juvenile Action*, 147 Ariz. 153, 155, 708 P.2d 1344, 1346 (Ariz. App. 1985); *State v. Garner*, 115 Ariz. 579, 581, 566 P.2d 1055, 1057 (Ariz. App. 1977); *State v. Alleman*, 439 So. 2d 418, 419-20 (La. 1983); *State v. Spell*, 461 So. 2d 654, 655-58 (La. App. 1984); *State v. Behrens*, 204 Neb. 785, 786-88, 285 N.W.2d 513, 514-16 (1979); *State v. Barr*, 99 Wash.2d 75, 76-79, 658 P.2d 1247, 1247-50 (1983); *State v. Rogers*, 30 Wash. App. 653, 653-55, 638 P.2d 89, 89-91 (1981).

21. *State v. Spell*, 461 So. 2d at 656-657 & n.3.

22. *People v. Corey*, 130 Misc.2d 228, 228-30, 495 N.Y.S.2d 620, 620-22 (N.Y. Crim. Ct. 1985); *Commonwealth v. Balisteri*, 329 Pa. Super. 148, 478 A.2d 5, 6-10 (1984).

23. See, e.g., *People v. Wyman*, 166 Cal. App. 3d 810, 810-13, 212 Cal. Rptr. 668, 668-71 (1985).

do so ... Restitution should be encouraged as both an aid in assisting the defendant's rehabilitation and as an aid in compensating the victim. ... Applying these principles to the facts of this case, damage to the emotional health of a child, can be as damaging, if not more so, than any physical injury. Appellant's conduct has caused severe emotional harm to his young victims and he must bear the financial expense, as far as feasible, for the alleviation of the mental anguish. Anything less would not comport with the purpose of restitution.<sup>24</sup>

Similarly, the Louisiana Supreme Court in *State v. Alleman* held that requiring an offender to pay restitution for pain and suffering was related to the criminal justice system's interest in rehabilitation.

Next, defendant argues that a sentencing judge may not impose the condition of restitution except for a tangible or physical loss, as opposed to the mental anguish, apprehension, and annoyance suffered by defendant's victims. ... Moreover, there is no reason to believe that restitution for such harms is any less reasonably related to rehabilitation than reparation for bodily injury or damage to property.<sup>25</sup>

Implicit in all decisions permitting restitution for pain and suffering, or for lost future earning capacity is the assumption that criminal courts are perfectly capable of calculating awards for unliquidated damages. The *Alleman* court argued:

"There is nothing in this language or in our law which would indicate a legislative intent to limit reparation or restitution to bodily injury or property damage. In the case of torts, for example, the jurisprudence has no difficulty in awarding a pecuniary indemnification for mental suffering, when it appears to be real and serious."<sup>26</sup>

Thus, courts which take the minority position do not accept the proposition that unliquidated damages are inherently too complex to be resolved by a criminal court. Arizona courts, however, have been careful to remark that *some* cases involving unliquidated damages may be better left to civil proceedings.<sup>27</sup>

Some courts have claimed that victims do not always obtain satisfaction when they sue for unliquidated damages in civil courts, and have

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24. 478 A.2d at 9.

25. 439 So. 2d at 419-20.

26. *Id.*

27. See, e.g., *State v. Garner*, 115 Ariz. 579, 580-81, 566 P.2d 1055, 1056-57 (Ariz. Ct. App. 1977).

suggested that criminal courts should order restitution for these damages. The Louisiana Appellate Court maintained in *State v. Spell*:

An additional argument raised by the defendant is that the restitution ordered is excessive because the victim has already been awarded \$225,000 in a civil judgment. With regard to this argument, it is significant defendant made no attempt to show he had or will pay any of this civil judgment. In fact, the trial court noted defendant's previously stated intention not to pay this judgment. In any event it appears defendant would be entitled to a credit on this civil judgment for whatever amount he pays in restitution. . . . Under these circumstances, the fact the victim has obtained a civil judgment, which remains unpaid, does not render the amount of restitution excessive.<sup>28</sup>

A trial court judge in the State of New York expressed great dissatisfaction with civil remedies for crime victims:

The more traditional approach has been to tell the victim that of course she may be entitled to . . . damages but not in this forum, she must go and sue civilly—a nicely-sounding technicality until the victim does attempt to sue civilly and of course very likely finds the civil remedies to be totally inadequate.<sup>29</sup>

While there are differences between those courts which bar sentencing judges from ordering restitution for unliquidated damages and the minority of courts which allow such awards, there are some areas of agreement. Punitive damages are a form of unliquidated damages. There is general agreement that punitive damages should not be awarded by criminal courts.<sup>30</sup> Punitive damages are awarded in civil proceedings as a means of deterring intentional torts. In the criminal process, fines, probation, and imprisonment serve deterrent purposes. No reason exists to compensate a victim beyond his total losses in a criminal court as a means of deterrence.<sup>31</sup> This author agrees that punitive damages should be limited to the civil sphere.

Two major factual assumptions separate courts in the majority and minority position. First, whether unliquidated damages are so complex that sentencing judges cannot resolve them in a reasonable time period. Second, whether civil courts are currently performing well in meeting the restitution needs of crime victims. This article will show that civil

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28. 461 So. 2d at 657.

29. *Corey*, 130 Misc.2d at 229-30, 495 N.Y.S.2d at 622.

30. See, e.g., *Ex Parte Clare*, 456 So. 2d 357, 358 (Ala. 1984); *Sprague v. State*, 590 P.2d 410, 415 (Alaska 1979); *State v. Hunt*, 80 N.C. App. 190, 341 S.E.2d 350, 354 (1986).

31. *Id.*



courts are not meeting the needs of crime victims, and will explore ways to minimize the problems associated with calculating unliquidated damages in a sentencing hearing

### III. COLLECTING DAMAGES

#### A. *Problems in Civil Courts*

Many victims face serious difficulties in actually collecting civil judgments for unliquidated damages. Criminal courts possess greater powers than civil courts to compel offenders to pay restitution, although collecting money from the typical violent offender is always difficult. Criminal courts can, however, at least under certain circumstances, imprison a probationer who willfully refuses to meet a criminal restitution order. Civil courts are generally barred from imprisoning a person who does not pay a civil debt. If criminal courts are better adapted to dealing with violent offenders, one option is to give criminal judges the authority to order restitution for unliquidated damages. Another possibility is to give criminal courts the authority to revoke probation if a probationer willfully refuses to pay a civil debt connected to the offense. Finally, civil courts could do a better job if legislatures gave them greater powers to use liens, garnishment powers, or civil contempt authority to enforce civil awards for victims of personal violence. All these options should be considered.

A victim must overcome several obstacles to win a civil suit for unliquidated damages. The first is cost. High transaction costs may prevent a victim from suing at all. One study found that only 4.8 per cent of victims of personal violence actually sued.<sup>32</sup> Crime victims like other civil plaintiffs must bear the expense for bringing a civil action. A major study of violent crime found that 97 per cent of violent crimes caused injuries amounting to a few hundred dollars or less.<sup>33</sup> Such small amounts of damages make a suit in superior court prohibitively expensive, or impossible because there is not enough money in controversy. Small claims courts are ill-equipped to collect damages from violent criminals.<sup>34</sup> While the amount in each case may be small, there are probably thousands of cases in which victims may not sue for unliquidated damages because the cost of a civil suit is too high.

Many courts and legislatures have assumed that excluding unliquidated damages from criminal sentencing does not hurt victims because they can use the criminal conviction to collaterally estop the offender from denying his liability in a subsequent civil suit. In 1982, Congress

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32. See Gittler, *supra* note 1, at 138 n.72 (study of 167 victims of personal violence).

33. Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203, 210-11 (1978).

34. *Id.*

for the first time gave victims statutory authority to use a criminal conviction for collateral estoppel purposes in subsequent civil suits.<sup>35</sup> Many circuits, however, had already implemented this policy so it was less of an innovation than it might have appeared. The Senate Report accompanying the VWPA confidently asserts the proposition that collateral estoppel will allow victims to collect unliquidated damages.

Subsection (b)(3) provides that conviction of an offense that would properly give rise to restitution shall estop a defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the victim. It is the Committee's intention in this subsection that a criminal conviction obviate a victim's need to establish a defendant's liability in a civil suit for punitive and/or compensatory damages.<sup>36</sup>

Of course, collateral estoppel will not help a victim if the defendant is never convicted, but neither could a criminal court issue restitution without a conviction. Collateral estoppel can help many victims with obtaining damages in a subsequent civil suit, but collateral estoppel does not guarantee a victim's success in civil proceedings.

There are two important components to every civil suit. First, plaintiffs must establish the defendant's liability. Second, plaintiffs must show the extent of their damages. The effectiveness of collateral estoppel can be undermined by the practice of charge bargaining or undercharging. A significant percentage of prosecutors and judges will permit a defendant to plead guilty to a lesser charge rather than take the time and expense to prove the defendant committed the "real" offense at a jury trial.<sup>37</sup> Charge bargaining hinders a victim both from establishing an offender's true liability, and, therefore, interferes with the ability of the victim to show the extent of unliquidated damages. For example, if a defendant pleads guilty to second-degree sexual assault when he actually committed a rape then the value of the conviction in helping a victim win damages for pain and suffering will be diminished. Since it is likely that a civil jury will award more damages for pain and suffering if a rape is proved, the victim may still have the burden of proving the defendant's liability for the real offense. The problem of undercharg-

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35. For cases holding that a civil plaintiff can use a criminal conviction to estop a defendant from denying liability *see, e.g.* *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951); *McCord v. Bailey*, 636 F.2d 606, 610 n.5 (D.C. Cir. 1980); *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1187-90 (3d Cir. 1978); *United States v. Podell*, 572 F.2d 31, 36 (2d Cir. 1978); *McNally v. Pulitzer Publishing Corp.*, 532 F.2d 69, 76 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976); *Cardillo v. Zyla*, 486 F.2d 473 (1st Cir. 1973).

36. 1982 U.S. CODE CONG. & ADMIN. NEWS at 2538 (SENATE REPORT).

37. *See generally*, Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 652-730 (1981).

ing could be largely eliminated if judges were required to find that the conviction offense matches the real offense before they accept a guilty plea, but until such reforms are implemented the value of collateral estoppel in helping victims win civil suits will be reduced.<sup>38</sup>

Even if collateral estoppel is effective in establishing an offender's liability, and the conviction offense equals the real offense, the victim still must prove the extent of his damages. Convictions seldom help a victim prove the extent of their damages. According to Professor Harland, "In fact, a finding of guilt in criminal court is rarely helpful in assessing the amount of loss or injury in the crime, since precision in determining the amount involved is usually unnecessary to a finding of guilt."<sup>39</sup> In criminal courts damage issues are left to the sentencing/restitution hearing. Several circuit courts have held that a victim cannot collaterally estop a judge's findings in the sentencing hearing about damages because the Seventh Amendment requires that the jury must be free to determine damages in a subsequent civil suit.<sup>40</sup> In any case, a sentencing judge would be unlikely to address issues related to the amount of unliquidated damages. Thus, a victim has the complete burden in a subsequent civil suit for showing the extent of unliquidated damages. A criminal conviction does not in itself guarantee that a civil jury will find that a victim suffered unliquidated damages. For instance, a jury might find in an assault case that a victim experienced no pain and suffering. There is always an element of uncertainty about whether a jury will award a significant amount of unliquidated damages, and the risk associated with bringing any civil suit may discourage many crime victims from instituting a civil suit for unliquidated damages at their own expense.

Victims face considerable problems in actually collecting civil judgments from criminals. Civil remedies are more likely to work against the typical white-collar offender, who usually comes from a middle-class background and probably has some assets, than against the average violent offender, who is often poor, a minority, and a teenager.<sup>41</sup> The poverty of many violent offenders is an enormous stumbling block that limits the effectiveness of restitution awards either by criminal or civil courts.

While both civil and criminal courts face serious problems in attempting to collect restitution from violent offenders, criminal courts general-

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38. Professor Goldstein has made a compelling argument that the conviction offense must be required to equal the real offense if the criminal justice system is to maintain an aura of integrity. See A. GOLDSTEIN, *THE PASSIVE JUDICIARY* 43-47 (1981).

39. Harland, *supra* note 2, at 98-99.

40. See, e.g., *United States v. Palma*, 760 F.2d 475, 479-80 (3d Cir. 1985); *United States v. Brown*, 744 F.2d 905, 910 (2d Cir. 1984); *United States v. Satterfield*, 743 F.2d 827, 838 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985).

41. See Harland, *supra* note 33, at 218-20, and *supra* note 11.

ly enjoy greater powers than civil courts to force violent criminals to pay. "Nevertheless, use of the criminal court as a more powerful enforcer than its civil counterpart is manifest."<sup>42</sup> Especially significant is the ability of criminal courts to revoke probation or parole if an offender willfully refuses to pay restitution. Criminal courts can even require that a probationer actively seek employment, and, as a result, can greatly increase the likelihood that the offender will have enough money to pay the restitution award.<sup>43</sup> There are, however, constitutional limitations on the ability of criminal courts to revoke parole or probation if the offender fails to pay his restitution obligation. The Supreme Court in *Bearden v. Georgia* held that a court or parole board cannot revoke a probationer's or parolee's status for failure to pay restitution if his poverty makes him unable to pay.<sup>44</sup> After *Bearden*, a court can still revoke probation or parole if it finds that the offender has willfully failed to pay restitution.<sup>45</sup> Of course, what constitutes "willfull" behavior is a complex question that can only be decided given the particular facts in a case.

#### *B. Using Criminal Courts to Enforce Civil Judgments*

Even if one accepts the argument that criminal courts are superior to civil courts at collecting restitution, one could still maintain that civil courts are the best forum in which to determine the amount of unliquidated damages, and that criminal courts should be limited to the task of enforcing such judgments. Criminal courts could use their revocation powers to pressure an offender to pay his civil restitution debt to the victim. Most probation and parole statutes, however, do not give courts or parole boards authority to enforce civil judgments.<sup>46</sup> Most criminal courts have not addressed this issue because they clearly lack jurisdiction to intervene in a civil case.<sup>47</sup> A few cases have held that a criminal court can, at least indirectly, make payment of a civil judgment a condition of probation.<sup>48</sup> Most cases, however, have rejected giving criminal

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42. See Harland, *supra* note 2, at 113 n.344.

43. See, e.g., *Bass v. State*, 473 So. 2d 1367 (Fla. Dist. Ct. App. 1985); *People v. Wells*, 90 Ill. App. 320, 413 N.E. 2d 218 (1980); *State v. Coffey*, 74 N.C. App. 137, 327 S.E.2d 606 (1985) (all involving probation revocation when probationer failed to seek employment). See generally Mank, *Post-Sentence Sentencing: Determining Probation Revocation Sanctions*, 18 *Cumb. L. Rev.* 437 (1988) (judges have broad discretion to revoke probation).

44. *Bearden v. Georgia*, 461 U.S. 660 (1983).

45. *Id.*

46. See, e.g., *ARIZ. REV. STAT. ANN.* § 13-603 (1986); *IOWA CODE ANN.* § 907 (West 1986); *N.M. STAT. ANN.* § 31-17 (1981).

47. See, e.g., *Shew v. Southern Fire & Cas. Co.*, 298 S.E.2d 380, 383 (1983). (Court lacks jurisdiction to revoke probation over a civil debt).

48. *Gross v. United States*, 228 F.2d 612, 615 (8th Cir. 1956); *People v. McClean*, 130 Cal. App. 2d 439, 444-45, 279 P.2d 87, 91 (1955); *People v. D'Elia*, 73 Cal. App. 2d 764, 769, 167 P.2d 253, 255 (1946).

courts a role in enforcing civil debts.<sup>49</sup>

There has been strong opposition among many criminal courts against making them into a debt collection agency. The Wisconsin Supreme Court declared in *State v. Scherr*, "Neither should the criminal process be used to supplement a civil suit or as a threat to coerce the payment of a civil liability and thus reduce the criminal court to a collection agency."<sup>50</sup> The Michigan Court of Appeals proclaimed in *People v. Moore*, "If one makes use of the criminal law for some collateral or private purpose, such as to compel the delivery of property or payment of a debt rather than to vindicate the law, he is guilty of a misuse of process, and a fraud upon the law."<sup>51</sup>

Revoking an offender's parole or probation status for a civil debt strikes some courts as tantamount to the hoary and discredited practice of imprisonment for debt.<sup>52</sup> Other courts have distinguished between civil debts, and collecting criminal restitution.<sup>53</sup> Many states have constitutional provisions against imprisonment for debt.<sup>54</sup> A number of courts have argued that criminal restitution does not establish a debtor-creditor relationship between the offender and victim, but instead aids in an offender's rehabilitation.<sup>55</sup> Therefore, according to the analysis of these courts revocation is permissible when the probationer fails to pay restitution, because the failure to pay shows the offender has failed to achieve rehabilitative progress.<sup>56</sup> A small number of judges have argued that revoking probation because the probationer fails to pay restitution is constitutionally impermissible since it is tantamount to imprisonment for debt. The Arizona Court of Appeals declared in *State v. Garner*: "Great

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49. See Harland, *supra* note 2, at 54-55 n.13, and *infra* notes 50-58.

50. 9 Wis. 2d 418, 424, 101 N.W.2d 77, 80 (1960).

51. 43 Mich. App. 693, 697, 204 N.W.2d 737, 739 (1972) (quoting *Hall v. American Inv. Co.*, 241 Mich. 341, 353, 217 N.W.2d 18, 20 (1928)).

52. See, e.g., *State v. Caudle*, 276 N.C. 550, 555, 173 S.E.2d 778, 782 (1970) ("To suspend a sentence of imprisonment for a criminal act, however just the sentence may be *per se*, on condition that the defendant pay obligations unrelated to such criminal act, however just owing, is a use of the criminal to enforce the payment of a civil obligation. . ."); *Ex parte Trombley*, 31 Cal. 2d 801, 804, 193 P.2d 734, 737 (1948) ("Although by its terms the prohibition is directed to imprisonment in civil actions, it has been held to apply in a criminal proceeding. . . The courts will not permit the purposes of the constitutional provision forbidding imprisonment for debt to be circumvented by mere form. . .").

53. *Maurier v. State*, 112 Ga. App. 297, 298, 144 S.E.2d 918, 919 (1965) (restitution as condition of probation is not violative of state constitution providing there shall be no imprisonment for debt; *People v. Mosesson*, 78 Misc.2d 217, 218, 356 N.Y.S.2d 483, 484 (N.Y. Sup. Ct. 1974) (restitution condition of probation does not create a debt nor a debtor/creditor relationship between persons making and receiving probation).

54. See Harland, *supra* note 2, at 113 n. 342.

55. See note 53 *supra*.

56. *Id.*

constitutional problems develop if the amount of reparations is an amount larger than the defendant can pay. When this occurs, and the defendant is later incarcerated for his failure to pay, we have what may be termed an imprisonment for debt problem."<sup>57</sup> It is unclear whether the limitations on revocation for failure to pay restitution contained in *Bearden* eliminate the imprisonment for debt problem.

Similarly, a dissenting judge on the Texas Court of Criminal Appeals argued, "If the appellant is unable to make the required restitution payments, and as a result his probation is revoked, will he not have been imprisoned for debt, contrary to the prohibition of Art. 1, Section 18, Texas Constitution?"<sup>58</sup>

In those jurisdictions in which a criminal court is not constitutionally barred from assisting victims in the enforcement of civil judgments, legislatures should encourage this practice. In addition legislatures should expand the collection powers of civil courts as a means to insure that victims actually collect the monies they win in a judgment.

There are strong reasons, however, for favoring criminal courts as the forum in which to both calculate and collect unliquidated damage awards, unless they are very complex. The constitutional problem raised when a criminal court revokes probation and incarcerates a probationer as a result of his failure to pay a civil debt can be avoided if the sentencing court orders restitution for the entire range of damages. In addition, it is inefficient to have civil courts determine restitution awards, and then to require criminal courts to enforce them. Criminal courts do not have the authority to revoke probation if a probationer fails to pay a civil debt unrelated to the offense for which he was sentenced.<sup>59</sup> To justify a revocation order based on a probationer's failure to pay a civil debt, a criminal court must provide written findings of fact that establish a clear connection between the debt and conviction.<sup>60</sup> To revoke probation for a civil debt, a criminal court essentially must redetermine the basis for the award; thereby, duplicating the work of the civil court. Thus, if a criminal court must enforce an award for unliquidated damages, it probably should calculate that award in the first place.

#### IV. THE SEVENTH AMENDMENT

##### A. *The Line Between Civil and Criminal*

Civil courts have traditionally awarded damages for pain and suffering, and for lost future earning capacity. The Seventh Amendment

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57. 115 Ariz. at 581, 566 P.2d at 1057.

58. *Flores v. State*, 513 S.W.2d 66, 71 (Tex. Crim. App. 1974) (Roberts, J., dissenting).

59. See note 52 *supra*.

60. See Goldstein, *supra* note 1, at 536-42 (reviewing cases discussing whether restitution is limited by the offense of conviction or the real offense behavior).

preserves a defendant's right to a civil jury trial for common law actions that existed when the Bill of Rights was enacted in 1791. If Congress passed a statute permitting federal sentencing judges to order restitution for unliquidated damages, defendants would challenge the constitutionality of the statute on the ground that such awards violate their Seventh Amendment right to a civil jury trial. A Seventh Amendment attack, however, would not apply to state courts because the right to a civil jury trial has never been incorporated into the Fourteenth Amendment as a fundamental right.<sup>61</sup> Most violent crimes are common law offenses under state jurisdiction. Only a small percentage of all federal crimes involve personal violence. Whether criminal courts should award unliquidated damages is mainly a state rather than a federal question; nonetheless, the Seventh Amendment issue presents interesting intellectual problems.

The Seventh Amendment states, "In suits at common law...the right of trial shall be preserved." There are two main ways to show that the Seventh Amendment does not prohibit sentencing judges from ordering restitution for unliquidated damages. First, one can demonstrate that criminal courts in 1791 had the authority to award unliquidated damages. While criminal courts in 1791 did not award restitution for pain and suffering, or for lost future earnings, they could award restitution for other kinds of unliquidated damages. The question is whether Congress can expand criminal restitution into new areas without violating the Seventh Amendment. Also, if civil courts in 1791 had exclusive authority to award unliquidated damages, were these civil remedies equitable or legal in nature? The Seventh Amendment only applies to common law remedies, but does not affect equitable action. If unliquidated damages for victim restitution are an equitable remedy the Seventh Amendment does not apply.

It is well established what kinds of damages criminal courts did award as restitution in 1791, but the present implications of these historical facts are not so clear. In the late eighteenth century English and American criminal courts awarded restitution only for the value of stolen property.<sup>62</sup> Some American states during the colonial period and in the early days of the Republic allowed a criminal court to order a larcenist to pay the victim double or triple the value of the stolen goods in restitution, which seems to be the same as a civil award for punitive damages.<sup>63</sup> Criminal courts in 1791 did not award restitution for many

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61. See, e.g., *Letendre v. Fugate*, 701 F.2d 1093, 1094 (4th Cir. 1983).

62. See *United States v. Brown*, 744 F.2d 905, 910 (2d Cir. 1984) (citing 4 W. BLACKSTONE, COMMENTARIES 362-63); *United States v. Fountain*, 768 F.2d 790, 801 (7th Cir. 1985); Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of its Present Usefulness*, 5 RICHMOND L. REV. 71, 76 (1970).

63. See Jacob, *Reparation or Restitution by the Criminal Offender to His Victim*:

types of liquidated damages such as medical expenses, lost wages, or funeral expenses.<sup>64</sup> On the other hand, in larceny cases criminal courts did award a form of punitive damages, which falls into the unliquidated category.<sup>65</sup>

In 1791 there was no distinction between civil and criminal restitution based on a division between liquidated and unliquidated damages. Today many jurisdictions allow criminal courts to order restitution for all varieties of liquidated damages, but exclude all types of unliquidated damages, although a minority of states allow sentencing judges to award at least some kinds of unliquidated damages. Some courts have argued that unliquidated damages should be awarded by a civil rather than a criminal court, but this separation may be a modern development rather than a reflection of what took place in 1791. Criminal courts in 1791 did not award many types of liquidated damages that are now commonly part of criminal restitution orders, yet criminal courts in some states did award a form of punitive damages, a type of unliquidated damages which almost all jurisdictions now exclude from criminal sentencing.<sup>66</sup> There may be good policy reasons for excluding unliquidated damages from sentencing proceedings, but history controls what the Seventh Amendment means.

A central issue is how far can legislatures expand the scope of criminal restitution beyond what existed in 1791. Defendants have raised Seventh Amendment challenges against the VWPA on the theory that the Act allows sentencing judges to award several kinds of liquidated damages which in 1791 only civil courts could decide. These damages include medical expenses, lost earnings, and funeral expenses.<sup>67</sup> Several circuit courts have upheld the VWPA's constitutionality against Seventh Amendment attacks on the ground that Congress can expand the range of damages in criminal restitution beyond those allowed in 1791.<sup>68</sup> The question is whether the same reasoning about enlarging the scope of criminal restitution beyond the limits that existed in 1791 applies to unliquidated damages for pain and suffering, and for lost future earning capacity. The reasoning in two circuit cases suggests that Congress could broaden criminal restitution to incorporate unliquidated damages without violating the Seventh Amendment, but dicta in two other circuit court decisions take the opposite view.

Two decisions by the Second and the Seventh Circuits have emphasized the ability of Congress to expand the spectrum of restitution

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*Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L. & CRIMINOLOGY 152, 155 (1970); Harland, *supra* note 2, at 57 n. 30.

64. See note 62 *supra*.

65. See note 63 *supra*.

66. See notes 62-65 *supra* and accompanying text.

67. See note 62 *supra*.

68. See notes 69-70 *infra*.



beyond what existed in 1791. Judge Newman argued in *United States v. Brown*,

Finally, we note that judicially ordered restitution comports with the common law practice at the time the Seventh Amendment was adopted. Common law judges awarded restitution in larceny cases, thereby sparing victims the need to pursue civil remedies. See 4 W. Blackstone, *Commentaries* \*362-63. Congress has ample power to build on this historic practice and authorize judges to order restitution for the full range of injuries suffered by crime victims. The Seventh Amendment is no barrier to this addition to the arsenal of federal criminal sanctions.<sup>69</sup>

The opinion does not specifically address the issue of allowing unliquidated damages in criminal restitution, but damages for pain and suffering, and lost future earnings are clearly part of "the full range of injuries suffered by crime victims." The reasoning in Judge Newman's opinion can be used to support the idea of allowing federal sentencing judges to award restitution for unliquidated damages.

Judge Posner's opinion in *United States v. Fountain* also emphasized the ability of Congress to build on historical precedent, and expand the range of criminal restitution beyond that permitted in 1791.

That forms of criminal restitution other than ordering stolen goods restored to the owner do not have so clear an historical pedigree does not matter. What matters is that criminal restitution is not some newfangled effort to get around the Seventh Amendment but a traditional criminal remedy; its precise contours can change through time without violating the Seventh Amendment.<sup>70</sup>

Judge Posner suggested that restitution for lost future earnings could fit within the domain of criminal punishment. "There is, indeed, no difference of principle between past and future earnings, so far as the purposes of criminal punishment are concerned."<sup>71</sup> His opinion apparently accepted the constitutionality of restitution orders for lost future earnings, but rejected these awards under most circumstances for the practical reason that they are usually too complex to resolve in a sentencing hearing.<sup>72</sup> He explicitly stated that judges in the Seventh Circuit may award restitution for lost future earnings if the defendant does not dispute the amount involved.

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69. 744 F.2d at 910.

70. 768 F.2d at 801.

71. *Id.*

72. *Id.*

This does not make the statute unconstitutional, however, or entitle the defendants to a jury trial on the issue of the restitution of their victims' lost future earnings. "Future" is not in the statute. Obeying the statutory directive that "the imposition of such . . . not unduly complicate or prolong the sentencing process," 18 U.S.C. § 3579(d), we hold that an order requiring a calculation of lost future earnings unduly complicates the sentencing process and hence is not authorized by the Victim and Witness Protection Act—*unless, to repeat a vital qualification, the amount is uncontested, so that no calculation is required.*<sup>73</sup>

Two other circuit court opinions have suggested that the Seventh Amendment bars sentencing judges from awarding unliquidated damages. These two courts come to a different conclusion about the validity of awarding unliquidated damages in criminal restitution probably because they used a different reasoning process to uphold the constitutionality of the VWPA than the *Brown* or *Fountain* courts employed. Neither the Eleventh Circuit in *United States v. Satterfield* nor the Ninth Circuit in *United States v. Keith* addressed the Seventh Amendment attack on the VWPA in terms of what kinds of damages criminal courts could award in 1791, or in view of what historical precedent suggests about the constitutional limits of criminal restitution, which is a serious weakness considering that the Seventh Amendment is defined by what existed in 1791.<sup>74</sup> Both the *Satterfield* and *Keith* courts made the rather circular argument that restitution under the VWPA does not violate the Seventh Amendment because Congress intended that such restitution constitutes a criminal penalty rather than a civil judgment. The *Satterfield* court argued,

The characterization of a penalty as civil or criminal is a question of legislative intent. *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980). In drafting the restitution provisions of the VWPA, Congress made clear in both the language of the statute and its accompanying legislative history that victim restitution would be imposed as a criminal, rather than civil, penalty.<sup>75</sup>

Neither the *Satterfield* nor the *Keith* courts examined the fundamental question of whether the Seventh Amendment places limits on what types of restitution or criminal penalties in general that criminal courts may impose regardless of what Congress intends.

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73. *Id.*, at 802.

74. See, e.g., *United States v. Keith*, 754 F.2d 1388, 1391-92 (9th Cir. 1985); *United States v. Satterfield*, 743 F.2d 827, 836-37 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985).

75. 743 F.2d at 836.

There is a fundamental contradiction in the analysis by the *Keith* and *Satterfield* courts. Both argue that Congressional intent determines whether a penalty is civil or criminal, yet each opinion assumes that unliquidated damages are inherently civil in nature.<sup>76</sup> Congress could declare pain and suffering to be a criminal penalty, and authorize sentencing judges to order such damages in restitution. The *Keith* court tried to make a distinction between restitution under the VWPA, which is defined as a criminal penalty, and unliquidated damages, which are civil damages. "Unlike an award of damages in a civil action, a restitution order under the Act may compensate only for the kind of harms enumerated in subsection 3579(b) (excluding, for example, pain and suffering)."<sup>77</sup>

The *Satterfield* court took a similar position. "The types of losses recoverable under the VWPA also distinguish its restitution provisions from civil judgments. Whereas under the Act, speculative damages such as pain and suffering... may not be recovered, such damages are frequently sought in civil actions."<sup>78</sup> The last portion of the *Satterfield* court's argument is illogical because all of the types of damages included in the VWPA are also "frequently sought in civil actions."

There may be good reasons why liquidated damages may be criminal penalties while unliquidated damages must be civil damages, but neither the *Keith* nor the *Satterfield* opinions explain why this distinction is necessary. It may be that speculative, unliquidated damages ought to remain in the civil sphere because of the greater discovery opportunities and time available in a civil proceeding, but that is a policy argument rather than a constitutional one. In 1791 criminal courts did not award damages for either medical expenses, or pain and suffering. If Congress can expand criminal restitution to include a wider variety of liquidated damages, it possibly could do the same with liquidated damages. The reasoning in *Brown* and *Fountain* suggests that Congress can expand criminal restitution to encompass the full range of victim injuries including unliquidated damages. Despite the dicta in these opinions, the rationale in both *Satterfield* and *Keith* is that Congress enjoys broad power to define what are criminal penalties, and what are civil penalties. Thus, the arguments in both *Satterfield* and *Keith* can be turned around to support the thesis that Congress is free to declare that unliquidated damages are criminal penalties, not civil ones.

Some people may be troubled by the notion raised in the preceding paragraph that Congress may be completely free to assign hitherto civil matters to criminal courts. If the Seventh Amendment means anything

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76. See note 74 *supra*, and notes 77-78 *infra*.

77. 754 F.2d at 1391.

78. 743 F.2d at 837 n.7.

there must be some limits on the authority of Congress to define what is civil, and what is criminal. A way exists to distinguish criminal restitution from civil damages even if sentencing judges can award the full range of damages to victims. Unlike civil courts, sentencing judges must consider a defendant's ability to pay before a restitution order is entered.<sup>79</sup> Criminal restitution serves the dual goals of compensating the victim, and of rehabilitating the offender by requiring him to take responsibility for the damage he has caused.<sup>80</sup> A number of courts have held that restitution orders should be limited to what an offender can reasonably be expected to pay since excessive restitution demands can harm the offender's ability to support his family, and thereby hurt his rehabilitative development.<sup>81</sup> Whether offenders are truly rehabilitated by the process of compensating victims for their losses is a debatable point, but the rehabilitative element in criminal restitution distinguishes it from civil damages.

If sentencing judges consider a defendant's ability to pay when they make restitution orders that alone may be enough to defeat any Seventh Amendment challenge.<sup>82</sup> Judges in "suits at common law" do not take into account a defendant's financial resources when they compute damages, but criminal restitution awards do take into account this factor. Judge Newman used this argument in *Brown* to show that criminal restitution is unlike civil damages, and thus not within the province of the Seventh Amendment.

Furthermore, though the VWPA was intended to compensate the victim, it does so in a manner distinct from the normal functioning of a civil adjudication. A court imposing an order of restitution is required to consider the defendant's ability to pay. 18 U.S.C. § 3580(a). The victim may therefore be awarded less than full compensation solely due to the offender's financial circumstances.<sup>83</sup>

As long as they consider the defendant's ability to pay, sentencing judges may be able to award any type of damages including unliquidated damages without violating the Seventh Amendment.

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79. See, e.g., 18 U.S.C. § 3580(a) (1982); *State v. Dillon*, 292 Or. 172, 177, 637 P.2d 602, 607 (1981).

80. See, e.g., IOWA CODE ANN. § 907.12(5) (West 1986); N.M. STAT. ANN. § 31-17-1(D) (1986).

81. See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 1325(2)(D) (1986); OKLA. STAT. tit. 22, § 991a(A)(1)(a) (1986); *Hugget v. State*, 83 Wis. 2d 790, 803, 266 N.W.2d 403, 409 (Wis. Ct. App. 1978).

82. *United States v. Brown*, 744 F.2d 905 at 910.

83. *Id.*

Three major arguments can be made about why the Seventh Amendment should not prohibit sentencing judges from ordering restitution for unliquidated damages. First, there is the argument in both *Brown* and *Fountain* that Congress can build on historical precedent, and expand the range of damages awarded in restitution. Second, one can use the reasoning in *Keith* and in *Satterfield* to argue that Congress has great power to define what is a criminal as opposed to a civil penalty, and, thus, Congress could define unliquidated damages as a criminal penalty. Both the first and second arguments share a common weakness. The Seventh Amendment may impose some limits on the extent to which Congress can define an issue as criminal or civil. The third argument is stronger. If judges consider a defendant's ability to pay when they assess criminal restitution they are acting in a fundamentally different manner than a civil court. An order of restitution that takes into account an offender's financial resources is not the same as a civil award that does not consider the defendant's means. Yet even the third argument might not convince those courts that apparently believe that unliquidated damages are somehow inherently civil in nature.<sup>84</sup>

#### *B. Equity vs. Common Law*

Assume that unliquidated damages are intrinsically civil in nature. It may still be possible to award such "civil" damages in a criminal proceeding because the Seventh Amendment only requires a civil jury trial for common law actions existing in 1791. The Seventh Amendment does not apply to civil actions traditionally decided by a chancellor sitting in equity. Judge Posner has argued that criminal restitution is equitable in nature.

Restitution is frequently an equitable remedy, meaning, of course, that there is no right of jury trial. . . . The Supreme Court has suggested that restitution of back pay under Title VII of the Civil Rights Act of 1964 is an equitable remedy not requiring a jury. See *Curtis v. Loether*, 415 U.S. 189, 197, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260 (1974). The same, it seems to us, is true of restitution under the Victim and Witness Protection Act of 1982.<sup>85</sup>

There is no case law on the point of whether restitution for unliquidated damages is an equitable or legal remedy. Awards for money damages can be equitable, although the classic equitable remedy is injunctive relief.<sup>86</sup> Restitution can arise under a number of circumstances

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84. See notes 77-78 *supra*.

85. *Fountain*, 768 F.2d at 801.

86. See *Curtis v. Loether*, 415 U.S. 189, 197 (1974).

in the civil context, and, indeed, an entire restatement is devoted to the problems of civil restitution.<sup>87</sup> Most civil restitution actions are considered to be equitable, but some are classified as legal ones.<sup>88</sup> The Sixth Circuit in a recent case declared, "Historically, an action for restitution seeks an equitable remedy for which there is no Seventh Amendment right to a jury trial."<sup>89</sup> On the other hand, Judge Easterbrook has disputed the common wisdom that restitution actions are equitable in nature.

The full picture is more complex. Remedies known as "restitution" were available in courts of law and equity alike before their merger, and terms such as "restitution" and "unjust enrichment" have slowly changed from distinctive forms of action to measures of damages available in actions of all sorts. . . . The evolution of the legal terms, coupled with the merger of the court systems, makes it difficult to say when a request for "restitution" or "constructive trust" is distinctively legal and when it is distinctively equitable—if these distinctions any longer have meaning for remedies measured solely in money.<sup>90</sup>

There is no clear answer about whether unliquidated damages are equitable or legal in nature if they are awarded as restitution to a crime victim. Whether the Seventh Amendment bars sentencing judges from ordering restitution for unliquidated damages remains an open question.

## V. DUE PROCESS

The Seventh Amendment does not apply to state courts, but restitution awards in both state and federal courts must meet the Fifth or the Fourteenth Amendment's due process requirements. When judges or juries evaluate claims for pain and suffering there is an intuitive or intangible element in their calculations. Any indefiniteness involved in assessing unliquidated damages raises serious constitutional questions about whether sentencing judges can apply rational standards, or whether such awards necessarily involve so much caprice on the part of the judge that due process cannot be achieved. The complexity associated with calculating damages for lost future earnings may render

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87. See RESTATEMENT (SECOND) OF RESTITUTION (1983).

88. See, e.g. *In re Evangelist*, 760 F.2d 27, 31 (1st Cir. 1985); *Securities & Exchange Commission v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 95 (2d Cir. 1978); *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 487 F. Supp. 999, 1006 (S.D.N.Y. 1980) (all shareholder derivative actions).

89. *Crews v. Central States, S.E. and S.W. Areas Pension Fund*, 788 F.2d 332, 338 (6th Cir. 1986) (refund of contributions to a pension fund).

90. *First Nat'l Bank of Waukesha v. Warren*, 796 F.2d 999, 1000 (7th Cir. 1986).

a summary sentencing proceeding to be a constitutionally inadequate forum.

Before examining the specific issue of what amount of due process is demanded when a determination is made about unliquidated damages, it will be useful to review the general due process protections that must be afforded to a defendant in a sentencing hearing. A criminal defendant is entitled to some degree of due process at a sentencing hearing.<sup>91</sup> The same degree of due process protection, however, need not be provided during the sentencing hearing as would be required at a trial.<sup>92</sup> Only minimal due process is required at sentencing.<sup>93</sup> "The sole interest being protected is the right not to be sentenced on the basis of invalid premises or inaccurate information."<sup>94</sup>

Due process demands that a restitution statute contain "sufficient safeguards to ensure that a sentencing judge, exercising appropriate discretion, will award restitution based on accurate facts and premises."<sup>95</sup> To decide whether a defendant has received adequate due process when a sentencing judge awards restitution, courts have focused on the degree to which a defendant has a reasonable opportunity to challenge the accuracy of a victim's claims. "Due process assures the defendant he will be given adequate notice and opportunity to contest the facts relied upon to support his criminal penalty."<sup>96</sup> If the defendant disputes the amount of restitution at stake, the sentencing judge must make factual findings supporting his restitution order. "The defendant facing restitution is further protected by Rule 32(c)(3)(D), which requires the trial court to make a factual finding on the record if the defendant challenges the accuracy of the information contained in the presentence report and relied upon by the sentencing judge."<sup>97</sup> Obviously Rule 32 (c)(3)(D) applies only to federal courts, but state courts have similar protections.<sup>98</sup>

There are additional process issues implicated in criminal restitution. The government bears the burden of persuasion in showing the extent of the victim's injuries.<sup>99</sup> The VWPA obligates the government to meet its burden of persuasion by a preponderance of the evidence, but some states apply the lesser burden of "reasonable certainty."<sup>100</sup> In

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91. See *Shelton v. United States*, 497 F.2d 156, 159 (5th Cir. 1974).

92. See, e.g., *United States v. Stephens*, 699 F.2d 534, 537 (11th Cir. 1983).

93. See, e.g., *Satterfield*, 743 F.2d at 840.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. See, e.g., N.C. GEN. STAT. § 148-57.1(a)-(b) (1978); *State v. Harris*, 70 N.J. 586, 362 A.2d 32 (1976) (written statement justifying restitution order).

99. See, e.g., 18 U.S.C. § 3580(d) (1982).

100. Compare 18 U.S.C. § 3580(d) (1982) with *State v. Harris*, 70 N.J. 586, 598, 362 A.2d 32, 38 (1976) (restitution "need not be proved by a preponderance of the evidence, qua evidence.").

some ways a defendant at a sentencing hearing has fewer rights than he would at a civil proceeding. The technical rules of evidence do not apply in most jurisdictions at the sentencing hearing, and in some states sentencing judges do not have to decide issues based on a preponderance of the evidence, but can employ a lesser standard.<sup>101</sup> A defendant in many jurisdictions does not have full access to the presentence investigation (PSI) prepared by a probation officer, and may not obtain complete information about the victim's restitution demands until shortly before the restitution hearing.<sup>102</sup>

The procedures which are generally employed when judges make restitution awards for liquidated damages may not be sufficient to satisfy due process requirements when unliquidated damages are at stake. The four states allowing sentencing judges to order restitution for unliquidated damages (Arizona, Louisiana, Nebraska, and Washington) do not require special procedures. Arizona decisions suggest, however, that judges in sentencing courts who make such awards, and appellate courts when they review them must be specially careful.<sup>103</sup> On the other hand, courts might hold that due process demands that speculative damages must be awarded in a civil proceeding with elaborate pleadings, full discovery, and the opportunity for a jury decision.<sup>104</sup> Those courts which have argued that civil proceedings are better suited to awarding speculative damages, however, have all based their decisions on policy grounds or statutory interpretation rather than by invoking due process.

Probably the leading or most widely cited opinion against allowing unliquidated damages in the criminal process is the Oregon Supreme Court's decision in *State v. Stalheim*.<sup>105</sup> The *Stalheim* court made a number of policy arguments to support its decision, which are summarized in the preceding paragraph, and based its holding on its reading of the relevant Oregon statute.<sup>106</sup> The *Stalheim* court did not, however, raise the issue that awards for unliquidated damages might be unconstitutional. In fact, the *Stalheim* opinion suggested that the legislature has the power to decide both civil and criminal liability in one trial.

"A part of the difficulties might be avoided if criminal and civil liability could both be resolved at one trial as is done in many

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101. See, e.g., *People v. Tidwell*, 33 Ill. App. 3d 232, 237, 338 N.E.2d 113, 117 (Ill. App. Ct. 1975).

102. See Fennel & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615 (1980).

103. See note 27 *supra*.

104. Cf. *State v. Jarvis*, 146 Vt. 636, 509 A.2d 1005, 1006-07 (Vt. 1986) (arguing on policy and statutory grounds not on due process).

105. *State v. Stalheim*, 275 Or. 683, 552 P.2d 829 (1976).

106. *Id.* at 686-88, 552 P.2d at 831-32.



civil law countries. . . . Such substantial procedural revisions should, of course, be made by the legislature."<sup>107</sup>

Only one case has directly considered the question of whether criminal courts are constitutionally competent to resolve questions of damages for pain and suffering. The Third District of the California Court of Appeals in *People v. Wyman* upheld a restitution fine based in part on the pain and suffering inflicted on two minor victims of lewd and lascivious acts.<sup>108</sup> As was noted earlier, under the California statute restitution for unliquidated damages is paid into a statewide victim compensation fund rather than directly to the individual victim so there might be some differences if the award was given to the victim. The *Wyman* court, however, firmly rejected the defendant's assertion that permitting criminal courts to assess unliquidated damages violates due process.

Relying on *State v. Stalheim*, . . . defendant asserts his fine represents "unliquidated damages" that were imposed in violation of due process of law. . . . To the extent defendant is claiming he was entitled by due process to a hearing other than the sentencing hearing he got in connection with the fine imposed on him, we reject that contention. . . . Defendant makes no contention that, in setting the amount of the fine, the trial court relied on information to which defendant had no opportunity to respond with appropriate affirmative evidence. We conclude defendant was afforded adequate due process under both state and federal Constitutions when the amount of his restitution fine was set at his sentencing hearing.<sup>109</sup>

The *Wyman* court indicated that sentencing judges are capable of determining unliquidated damages as long as the defendant is provided adequate notice and opportunity to contest the damages.

Another approach to the due process question would be to argue that the calculation of speculative damages by a sentencing judge necessarily violates due process because there are no standards by which to determine the award. In *United States v. Welden* the district court held that the VWPA's restitution procedures violated due process since there were no "ascertainable standards" set forth in the statute.<sup>110</sup>

" 'Due process' and 'equal protection' are brother and sister. To meet their requirements, a statute must not subject an individual

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107. *Id.* at 689, 552 P.2d at 833 n.12.

108. 166 Cal. App. 3d 810, 212 Cal. Rptr. 668 (1985).

109. *Id.* at 814-16, 212 Cal. Rptr. at 671-72.

110. 568 F.Supp. 516, 534 (N.D. Ala. 1983) (emphasis in original).

to arbitrary or uneven exercises of power. . . .The test of 'due process' is essentially a test of fairness and reasonableness. . . .There must always be *ascertainable standards*."<sup>111</sup>

The Eleventh Circuit in *United States v. Satterfield* overturned the *Welden* decision, and held that the VWPA contained sufficient procedural protections to meet due process requirements.<sup>112</sup> The *Satterfield* court, however, did indicate that some restitution awards might not meet constitutional standards. "We believe it is possible for a defendant in a particular case to have his right to a fair sentencing hearing violated by the arbitrary imposition of restitution."<sup>113</sup>

While the *Welden* court's reasoning has not been accepted in the context of the VWPA, courts might find that restitution orders for pain and suffering violate due process because of the lack of ascertainable standards. Unliquidated damages are by definition those damages which are not "easily ascertained."<sup>114</sup> There is no way to put an exact price on pain and suffering without making an arbitrary determination in some sense. A number of decisions have suggested that courts may only award criminal restitution if it is possible to place a precise figure on the extent of damages. The Seventh Circuit recently stated in *United States v. Mischler* that "it is equally clear that the amount of restitution must be definite."<sup>115</sup> The Tenth Circuit in *United States v. Watchman* argued, "For the restitution order the court is not dealing with generalities. In the dollar determinations there is no discretion of any significant degree. The victim has specific monetary losses,"which need to be established."<sup>116</sup>

It is unclear whether restitution orders for pain and suffering would violate due process. Due process requirements might be met if the defendant is given notice and opportunity to contest the amount, and the judge supports the order with factual findings. On the other hand, restitution for pain and suffering might violate due process if the court finds there are no ascertainable standards. There is a way to establish standards for determining pain and suffering awards that may overcome due process objections. A number of states allow sentencing judges to order restitution for wrongful death damages.<sup>117</sup> These restitution orders for wrongful death damages have been able to pass constitutional muster because damages are based on the support needs of the surviving fam-

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111. *Id.*

112. *Satterfield*, 743 F.2d 827, 827-51.

113. *Id.*, 743 F.2d at 840.

114. *State v. Fleming*, 125 N.H. 238, 245, 480 A.2d 107, 111 (1984).

115. 787 F.2d 240, 245 (7th Cir. 1986).

116. 749 F.2d 616, 619 (10th Cir. 1984).

117. See, e.g., IOWA CODE ANN. § 907.12(a)(b) (West 1986); N.M. STAT. ANN. § 31-17-1(a)(2) (1986); OHIO REV. CODE ANN. § 2929.02(D) (Baldwin Supp. 1986).

ily rather than the decedent's future earning capacity.<sup>118</sup> In family courts guidelines are often employed to calculate how much child and spousal support a separated or divorced spouse must pay to his family.<sup>119</sup> Use of these support guidelines in the context of restitution awards for wrongful death has allowed criminal courts to overcome constitutional attacks on the theory that they are determined in an arbitrary fashion. The Michigan Court of Appeals in *People v. Wager* upheld a restitution order for wrongful death actions.

Further, restitution payments were not set in an arbitrary fashion. The \$30 per child per week payments ordered by the trial court conformed to the Friend of the Court schedule as it applied to the amount earned by the defendant. . . the amount of restitution actually set was one which best accorded with defendant's ability to pay.<sup>120</sup>

If sentencing judges employ guidelines to assist them in calculating unliquidated damages, then such restitution orders may be able to meet the extremely stringent due process standards put forward in *Welden*.

## VI. GUIDELINES

### A. *The English Experiment*

Guidelines can serve two purposes in criminal restitution. First, their use may allow damage awards to meet due process requirements. Second, guidelines may serve a practical function in assisting sentencing judges to determine damages awards in an expeditious manner. Guidelines may work better for some kinds of damages than others. English courts have already experimented with guidelines for injury pain and suffering. Constructing guidelines for emotional pain and suffering, however, may pose insurmountable difficulties. The factors involved in calculating lost future earnings may be too individualized to permit a guidelines approach.

The English courts have tested guidelines to help criminal judges assess restitution for injury, pain, and suffering caused by physical wounds, but have not examined similar guidelines for calculating damages for emotional trauma. During the 1970s in England it became apparent that while criminal courts were largely successful in meeting the restitution needs of victims in property crime situations sentencing judges rarely provided reasonable restitution to violent crime victims.

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118. See, e.g., *People v. Wager*, 129 Mich. App. 819, 342 N.W.2d 619 (Mich. Ct. App. 1983); *State v. Barr*, 99 Wash.2d 75, 658 P.2d 1247 (1983) (en banc).

119. See *Wager*, 129 Mich. App. at 821-22, 342 N.W.2d at 622.

120. *Id.*

A national study of compensation orders in magistrates' courts, which was undertaken by the Home Office Research Unit in 1974, demonstrated that, in cases of damage to property, 90 per cent of defendants convicted were ordered to pay compensation compared with only 9 per cent of persons convicted of assault occasioning actual bodily harm or wounding.<sup>121</sup>

English criminal judges enjoy the power to order restitution for injury, pain, and suffering, but they have been reluctant to undertake the difficult task of calculating such damages. "Whereas monetary loss incurred as a direct result of the offense can be readily quantified, calculating a figure in respect of the actual injury, pain and suffering tends to be seen by magistrates as something best left to the expertise of judges presiding in the civil courts."<sup>122</sup>

The Home Office Research Unit initiated a study to see whether criminal courts would be more willing to award restitution for injury pain and suffering if guidelines were established to determine the amount of damages for specific kinds of injuries.

In an attempt to overcome this problem and thus encourage a wider use of compensation for injury, in June 1976 magistrates from the four South Yorkshire benches began to operate guidelines, which were drawn up by the liaison judge for South Yorkshire. These were subsequently adopted by the Solihull Magistrates Court.<sup>123</sup>

The Guidelines were a considerable success in the South Yorkshire and Solihull courts. Before the Guidelines these courts had only awarded damages for injury, pain, and suffering in two percent of the cases, but after the guidelines awards were made in twenty-four percent of the cases.<sup>124</sup> Of course, in the majority of the cases awards were still not made but these omissions were due to conscious choices because of the relationship between the victim and offender. In 31.7 percent of the cases the court did not award restitution because the violence took place in a domestic situation, a policy many feminists would attack, and in 29.7 per cent no award was made due to victim provocation.<sup>125</sup> Most importantly, in only five of the 199 cases did the criminal court state that it rejected awarding damages for injury, pain, and suffering because the assessment would be better left to a civil court.<sup>126</sup> "In the opinion of

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121. Vennard, *Magistrates' Assessments of Compensation for Injury*, 1979 CRIM. L. REV. 510.

122. *Id.*

123. *Id.*

124. *Id.* at 513.

125. *Id.*, at 514.

126. *Id.*, at 514-15.

the clerks and bench chairmen it was largely as a result of using the guidelines that the bench was no longer constrained by the problem of assessing a suitable amount."<sup>127</sup>

The South Yorkshire Guidelines scaled awards according to the gravity of the injury. The recommended award for a blow without a bruise was £ 5 sterling; for a bruise with a small cut up to £ 30; for a cut with stitches between £ 25 to £ 75; and for a fracture over £ 50.<sup>128</sup> The theory behind the Guidelines is that a more serious physical injury probably entails more pain and suffering.<sup>129</sup> Magistrates could award more or less than the Guidelines figure, and did so in a significant number of the cases. For example, in eight of the eleven fracture cases magistrates awarded less than the recommended amount.<sup>130</sup> Such adjustments are a healthy way of keeping guidelines in touch with the judicial perception of reality. Nonetheless, judicial discretion may raise due process questions about whether there are any real standards. The majority of magistrates and clerks involved in the study had favorable opinions regarding use of the Guidelines.<sup>131</sup>

In 1986 Parliament was seriously considering extending the guidelines approach to all criminal courts.

The Hodgson Commission has recommended that courts be required by legislation to consider a compensation order in every case; the Home Secretary is considering the feasibility of requiring courts to give reasons for not imposing a compensation order in any case involving personal injury, loss or damage. One undoubted difficulty is that of assessing the appropriate amount of compensation in personal injury cases. The Criminal Injuries Compensation Board is drawing up a set of guidelines on levels of compensation for various kinds of injury, and it is hoped that this will reduce some of the complexity of decisions which magistrates are expected to take in these cases.<sup>132</sup>

If the English courts adopt the guidelines concept for determining restitution on a widespread basis it will provide a useful lesson for whether American courts should do the same.

### *B. Emotional Pain and Suffering*

So far, the British guidelines have not included damages for emotional pain and suffering. There are greater conceptual and practical dif-

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127. *Id.*, at 515.

128. *Id.*, at 518.

129. *Id.*

130. *Id.*

131. *Id.*, at 519.

132. Ashworth, *Punishment and Compensation: Victims, Offenders and the State*, 6 OXFORD J. LEGAL STUD. 86, 117-18 (1986).

difficulties associated with calculating damages for emotional pain and suffering. Although estimating the extent of a victim's pain and suffering is always problematic, emotional pain and suffering may vary more among victims than physical pain and suffering does among victims who receive similar physical injuries. Emotional pain and suffering can be very significant specially for victims of sexual assault. The factors involved in assessing emotional pain and suffering, however, are so complex that a guidelines approach probably will not work. Likewise, calculations for lost future earnings entail too many individual aspects that cannot be reduced to general formulas.

A guidelines approach is relatively well suited to the context of injury pain and suffering. If two victims both receive a broken arm as the result of a crime, giving each victim approximately the same amount of compensation seems reasonably fair. Of course, there may be some differences in how two victims experience pain from a similar physical injury. One victim may suffer a more complicated and, perhaps, painful type of bone fracture. Children and elderly people may, on average, be more sensitive to physical pain. While every injury is in one sense unique, physical injuries appear comparatively well suited to a quantitative approach. We cannot measure how much pain a person feels, but calculating injury pain and suffering based on the seriousness of the physical injury is as good a criterion as we are likely to find.

Since even similar injuries such as bone fractures vary a great deal it probably makes sense to give judges some discretion concerning the amount of the award. On the other hand, clearly one goal of guidelines is to achieve some degree of uniformity. The question of how much discretion sentencing judges ought to have, and how sentence guidelines should structure that discretion are topics of enormous controversy.<sup>133</sup> Probably the best way to sum up the experience with sentence guidelines is that both too much judicial discretion, and rigid, inflexible guidelines are bad.<sup>134</sup> The newly adopted United States Sentencing Guidelines give sentencing judges the discretion to increase or decrease a guideline sentence by twenty-five percent, which seems to be a reasonable compromise.<sup>135</sup>

From a policy standpoint the best approach would be to give judges some discretion to depart from the guidelines to take into account individual differences. There is, however, the constitutional problem raised in *Welden* about whether there are ascertainable standards to meet due process requirements. Legislatures can minimize the possibility that restitution guidelines which allow judges some discretion will be struck

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133. See Note, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258 (1986) (surveying the literature on sentence guidelines).

134. *Id.*

135. UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES AND POLICY STATEMENTS FOR THE FEDERAL COURTS § 5.1 (April 13, 1987) (sentencing table).

down as constitutionally infirm by establishing statutory criteria delineating when judges can depart from the guidelines amount for restitution.<sup>136</sup> A statute could set out permissible factors for increasing or decreasing a restitution award for injury, pain, and suffering. For example, a judge could reduce the award if he finds that there was some significant degree of victim provocation. On the other hand, a judge might increase the award if a child or an elderly victim were involved. Employing statutory departure criteria would permit judges some flexibility without allowing judges unfettered discretion that might violate a defendant's due process rights.

Guidelines are compatible with a moderate amount of discretion. If the majority of cases, however, are significantly different such that judges must depart from the guidelines often and by a wide amount, the guidelines would likely be impractical. Consequently, the extent of a judge's discretion could be constitutionally suspect. Take, for example, emotional pain and suffering, or lost future earnings which could demand many departures from the guidelines.

Emotional pain and suffering does not lend itself well to a guideline approach. The seriousness of a physical injury can be measured with a reasonable amount of certainty, and damages for injury pain and suffering can be scaled according to the seriousness of the physical injury. On the other hand, it is difficult to compare the psychological state of a victim before and after a crime. The same kind of criminal activity can cause vastly different psychological responses in two different victims. A criminal may commit a mugging in the exact same way on successive nights against two different victims. One victim may suffer from nightmares and anxiety attacks for months, while the other victim is barely affected. Sexual crimes are specially traumatic, but even among rape victims there is considerable variation in the extent of the psychological harm caused by the crime.<sup>137</sup> The Minnesota Supreme Court declared in *State v. Fader*, "A sexual assault victim's loss is difficult to quantify. . . . It would include the cost of necessary treatment and related expenses, but beyond that, one gets into the realm of speculation."<sup>138</sup> It is very difficult to develop criteria for deciding which rape or mugging victims are more likely to experience great emotional pain and suffering. There are too many individual variations in psychological type for a guidelines system to successfully quantify emotional pain and suffering monetarily.

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136. Minnesota allows sentencing judges to depart from the sentence guidelines for "substantial and compelling" circumstances. See, e.g., *State v. Wellman*, 341 N.W. 561, 561-63 (Minn. 1983) (double departure is permissible).

137. See *Estrich*, *supra* note 13.

138. 358 N.W.2d 42, 48 (Minn. 1984).

In addition, there are too many individual factors essential in the calculation of lost future earnings to allow a workable system of guidelines. There is a concern with regard to the extent of a victim's disablement. A leg injury could mean that the victim is disabled by either twenty or forty per cent. Much would depend on what type of work the victim did before the injury. A physical injury would probably reduce the future earning capacity of an outdoor worker more than a sedentary worker. These factors are too complex and individualized to reduce to guidelines.

Also, there is a concern with regard to the earning capacity a person would have had in the future without suffering an injury. The plaintiff and defendant will present experts who may offer widely different assessment on both these issues. The calculation of lost future earnings is, as Judge Posner argues, too complex for criminal courts in most cases. The Louisiana Appellate Court, nonetheless, has upheld a restitution order by a sentencing court for lost future earnings.<sup>139</sup> Comprehensive guidelines for assessing lost future earning capacity are probably unworkable. It is commonplace, however, for civil judges to use standard tables to calculate a person's future life expectancy, and for determining the present value of a future stream of earnings. Guidelines are useful in some, but not all circumstances.

## VII. CONCLUSION

Some kinds of unliquidated damages are too complex for criminal judges to resolve in a sentencing hearing, but a guidelines approach could be used to calculate pain and suffering resulting from an injury. Generalizations are dangerous. Most courts have accepted the common wisdom that unliquidated damages are simply too complex to award in a summary sentencing proceeding. Instead of viewing all varieties of unliquidated damages as a homogeneous mass, a court must examine each type of unliquidated damages on a case by case basis to determine whether such damages could be calculated by the criminal judge without unnecessarily prolonging the sentencing hearing. Injury pain and suffering can fit within the criminal process.

Even if it is possible to award damages for injury pain and suffering, should the criminal justice system devote the necessary resources when almost all jurisdictions face serious budget constraints? Today, providing the fullest possible compensation to victims is a high priority in most jurisdictions; as a result, criminal judges should order restitution in every case for the full range of damages unless there are strong reasons not to award a particular kind of damages.<sup>140</sup> The presumption

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139. *Fountain*, 768 F.2d at 801-02; *Spell*, 461 So. at 656-57 & n.3.

140. SENATE REPORT, *supra* note 16, at 2536-39.



in the VWPA is that a judge should order restitution in every case unless calculating the award would "unduly complicate or prolong the sentencing process."<sup>141</sup> The Senate Report accompanying the VWPA made it clear that the criminal justice system must strive to achieve the fullest possible amount of victim restitution.

The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.<sup>142</sup>

Criminal courts must balance the cost of calculating a restitution award against the benefit in satisfying the needs of the victim. Even in the case of injury pain and suffering some types of injuries may present complex problems better left to civil courts. The present system, however, is inefficient because it automatically assumes that all forms of unliquidated damages are too complex to resolve in a sentencing hearing. Only a case by case approach can achieve optimal results. Judges should have the power to calculate awards for emotional pain and suffering, and for lost future earnings if they feel the issues in a given case are simple enough to resolve in a summary sentencing hearing. Economic efficiency is usually enhanced when decisions are left to individuals rather than proscribed by legislative fiat. Each judge should have the discretion to decide when unliquidated damages can be resolved by him or her in a sentencing hearing, and when they must be dealt with by a civil court.

There are some differences in how liquidated and unliquidated damages should be treated. A judge is obligated by the VWPA to award restitution for liquidated damages unless he or she provides a written justification.<sup>143</sup> Thus, there is a strong presumption in the VWPA that sentencing judges ought to order restitution for liquidated damages. Unliquidated damages in general are more complex than liquidated damages. A different presumption should exist concerning restitution for unliquidated damages. If a guideline approach is adopted for injury, pain, and suffering, there should be a presumption in favor of such awards but it should be less strong than the one employed for liquidated damages. A trial judge would be required to explain in writing when he believes that a particular injury is too complex to permit a reasonable award calculation using the guidelines. Appellate courts should accept

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141. *Id.*, at 2537.

142. *Id.*, at 2536.

143. 18 U.S.C. § 3579(a)(2) (1982).

this written statement unless it is clear that the trial judge is attempting to avoid any use of the guidelines for injury, pain, and suffering because he is philosophically opposed to guidelines, or to allowing criminal courts to award unliquidated damages. If a legislature adopts such guidelines judges should use them at least in the easy cases. Judges should have the discretion to award damages for emotional pain and suffering, and for lost future earnings, but judges should not have to justify a decision not to award such damages. These damages will remain largely in the civil sphere, but, as Judge Posner has suggested, there is no reason not to award damages for lost future earnings if the defendant can present no objections to the amount.<sup>144</sup>

Even if sentencing judges obtain the power to award unliquidated damages, many crime victims will still have to seek civil remedies. Reforms should be undertaken wherever necessary to improve the collection techniques available to crime victims in the civil arena. Even at best, however, civil courts are ill suited for the task of getting the average impoverished violent criminal to pay. Criminal courts have better tools for collecting debts from violent criminals: revocation powers and probation officers.<sup>145</sup> While there are a number of philosophical and theoretical problems, legislatures should at least consider allowing criminal courts some role in collecting civil damages related to the offensive behavior. Whether a criminal or a civil court determines a damage award should not make an enormous difference in whether a victim is likely to collect. Civil and criminal courts should work together in helping victims to obtain compensation from offenders. Already the VWPA allows a victim to enforce a criminal restitution order in a civil court "in the same manner as a judgment in a civil action."<sup>146</sup> Such reciprocity should work in both directions. Criminal courts should be able to help victims who win civil judgments.

It is impractical to resolve all damage issues through the criminal process unless we are willing to transform the summary sentencing hearing into a lengthy and costly mini-trial. There are some real differences between civil and criminal courts in terms of what kinds of damage questions they can most effectively handle. Civil courts may be better forums to settle some types of restitution issues including some varieties of white-collar crime, and of unliquidated damages. Too many artificial distinctions, however, have been made with regard to what criminal and civil courts can do for crime victims. The presumption should be in favor of deciding restitution issues in criminal courts unless the costs are clearly too high. Victims should not have to undertake the expense of

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144. *Fountain*, 768 F.2d at 802.

145. See notes 32-60 *supra* and accompanying text.

146. 18 U.S.C. § 3579(h) (1982).

initiating a civil action, and of attempting to collect a civil damage award unless there are strong reasons why the criminal justice system cannot determine the victim's losses, and order restitution. The goal should be the same for both the civil and criminal courts in deciding the damage issue. Both criminal and civil courts must work harder to insure that those offenders who can pay do pay. There are no panaceas for guaranteeing full victim compensation; nonetheless, a better job can be done.